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DEC 22 2008

OFFICE OF PETITIONS

In re Application of :
Smith, et al. : DECISION ON PETITION
Application No. 10/562,525 :
Filed: December 27, 2005 :
For: FENCING INCLUDING VISIBLE :
BAND :

This decision is in response to the renewed petition under 37 CFR 1.137(a), filed October 20, 2008, to revive the above-identified application.

The petition is **DISMISSED**.

Any request for reconsideration of this decision must be submitted within **TWO (2) MONTHS** from mail date of this decision. Extensions of time under 37 CFR 1.136(a) are permitted. The reconsideration request should include a cover letter entitled "Renewed Petition under 37 CFR 1.137(a)." This is not a final agency decision.

The application became abandoned July 9, 2007 for failure to timely submit a proper reply to the restriction requirement mailed June 8, 2007. The restriction requirement set a one month shortened statutory period of time for reply. No petition for extension of time under 37 CFR 1.136(a) was requested. Notice of Abandonment was mailed January 8, 2008.

A grantable petition under 37 CFR 1.137(a) must be accompanied by: (1) the required reply, unless previously filed; (2) the petition fee as set forth in 37 CFR 1.17(l); (3) a showing to the satisfaction of the Director that the entire delay in filing the required reply from the due date for the reply until the filing of a grantable petition pursuant to 37 CFR 1.137(a) was unavoidable; and (4) any terminal disclaimer (and fee as set forth in 37 CFR 1.20(d)) required pursuant to 37 CFR 1.137(c).

The petition fails to satisfy requirement (1) set forth above. A proper reply to date has not been submitted. The reply submitted March 17, 2008 is unacceptable as it has not been properly executed in accordance with 37 CFR 1.33(b) in that it has not been signed by each inventor named in the application.

Any renewed petition must be properly executed in accordance with 37 CFR 1.33(b)

The instant petition fails to satisfy requirement (3) set forth above. Petitioner has failed to present a showing to the satisfaction of the Director that the entire delay in filing the required reply from the due date for the reply until the filing of a grantable petition pursuant to 37 CFR 1.137(a) was unavoidable.

The Office may revive an abandoned application if the delay in responding to the relevant outstanding Office requirement is shown to the satisfaction of the Director to have been "unavoidable." See, 37 CFR 1.137(a)(3). Decisions on reviving abandoned applications have adopted the reasonably prudent person standard in determining if the delay was unavoidable. Ex parte Pratt, 1887 Dec. Comm'r Pat. 31, 32-33 (Comm'r Pat. 1887) (the term "unavoidable" "is applicable to ordinary human affairs, and requires no more or greater care or diligence than is generally used and observed by prudent and careful men in relation to their most important business"); In re Mattullath, 38 App. D.C. 497, 514-15 (D.C. Cir. 1912); Ex parte Henrich, 1913 Dec. Comm'r Pat. 139, 141 (Comm'r Pat. 1913). In addition, decisions on revival are made on a "case-by-case basis, taking all the facts and circumstances into account." Smith v. Mossinghoff, 671 F.2d 533, 538, 213 USPQ 977, 982 (D.C. Cir. 1982). A petition to revive an application as unavoidably abandoned cannot be granted where petitioner has failed to meet his or her burden of establishing the cause of the unavoidable delay. Haines v. Quigg, 673 F. Supp. 314, 5 USPQ2d 1130 (N.D. Ind. 1987).

Petitioners argue that a reply to the restriction requirement was "despatched on October 31st through New Zealand Post and DHL to the US Patent and Trademark Office." Petitioners indicate that this reply included a bank draft for \$795.00. Petitioners argue that the package containing the reply was lost prior to reaching the USPTO.

The receipt date accorded to correspondence is the date on which the complete transmission is received in the United States

Patent and Trademark Office, unless that date is a Saturday, Sunday, or Federal holiday within the District of Columbia. See, 37 CFR 1.6(a)(3).

Petitioners herein have failed to establish that a reply to the restriction requirement was timely received by the USPTO. Instead, petitioners argue that the package containing the reply was lost prior to the delivery to the UPSTO.

Applicants utilizing courier services, such as DHL, do so at their risk. The deposit with a courier service of correspondence intended for the USPTO but lost prior to delivery to the USPTO is not unavoidable delay within the meaning of 37 CFR 1.137(a).

Any renewed petition must establish that the entire period of delay in filing the required reply from the due date for the reply until the filing of a grantable petition pursuant to 37 CFR 1.137(a) was unavoidable.

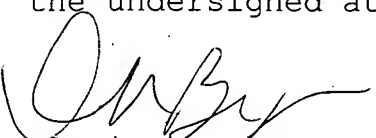
Further correspondence with respect to this matter should be addressed as follows:

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 Alexandria, VA 22314

By facsimile: **(571) 273-8300**
 Attn: Office of Petitions

Telephone inquiries concerning this matter may be directed to the undersigned at (571) 272-3205.



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